FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 7 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 755

W. T. HAGANS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
for the Fifth Circuit.

J. SEWELL ELLIOTT
Suite 506 Persons Building,
MACON, GEORGIA
Counsel for Petitioner.

INDEX

Opinion below 1

Jurisdiction 1

Questions presented 2

Statutes and Federal Rules involved 3

Statement of the Case 3

Reasons for granting the writ 6

First Question 6

Second Question 8

Third Question 10

Fourth Question 13

Conclusion 17

Certificate of Service 17

Appendix 19

Opinion 19

Judgment 28

Statutes 26

Federal Rules and Criminal Procedure 28

Charge to the Jury on Entrapment 28

CITATIONS

Ford v. United States, (C.A. 5) 210 F 2d 313 15

Lowery v. United States, (C.A. 2) 128 F 2d 580 15

Mammoth Oil Co.. v. United States, 275 US 13 15

Masciale v. United States, 356 US 386, 2 L ed 2d 859, 78 S Ct 827 ..... 6, 7

McClanahan v. United States, (C.A. 5) 230 F 2d 919 15

Nalls v. United States, (C.A. 5) 240 F 2d 707 15

Schmidt v. United States, (C.A. 8), 237 F 2d 542, 543 14,16,17

Sherman v. United States, 356 US 369, 2 L ed 2d 848, 78 S Ct 819 ..... 3, 6, 8

Sherman v United States, (C.A. 2), 200 F 2d 830 ..... 10, 13

Sorrells v United States, 287 US 435, 77 L ed 413, 53 S Ct 210, 86 ALR 249 ..... 3, 6, 7, 12

Statutes and Rules

Section 5008 (b) (1), Internal Revenue Code of 1954 ..... 3, 26

Section 5642, Internal Revenue Code of 1954 ..... 3, 27

Rule 26, Federal Rules of Criminal Procedure 3, 14, 16, 28

Rule 52(b), Federal Rules of Criminal Procedure 3, 12, 28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No.....

W. T. HAGANS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals for the Fifth Circuit.

Petitioner, W. T. Hagans, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on the 16th day of December, 1958.

OPINION BELOW

The opinion of the court of Appeals for the Fifth Circuit (R. 261) is reported at 261 F.2d 924 and is reproduced in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 16th day of December, 1958, (R. 261). Petitioners filed a petition for rehearing on the 19th day of January, 1959, (R. 273), which, after consideration, was denied by the Court of Appeals without opinion on the 5th day of February, 1959, (R. 277). The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

QUESTIONS PRESENTED

Appellant was tried on a seven count Indictment charging violation of the Internal Revenue Laws relating to liquors and was convicted on two of those counts.

Appellant relied upon the defense of entrapment testifying that the entire idea of the liquor operation was conceived by the officers. The evidence in the case was conflicting as to whether the law enforcement officers or appellant contacted the other first. However, the evidence indisputably shows that the officers for a period of approximately two months arranged sales, accepted bribes, promised protection, posed fictitiously, caused advance orders for illicit liquor to be placed, and did many other things in the furtherance of the operation. The acts upon which he was convicted were the results of sales actually made to federal officers, orders for which had been placed at least a week ahead of time. The question of entrapment was submitted to the jury.

During the taking of the evidence, the defense attorney asked a prosecution witness, who had testified that he was wearing a recording device while conversing with appellant at the time of the first violation upon which appellant was convicted, to turn over to him the recording device so he could play it before the jury. The prosecuting attorney then offered his lengthy unsworn testimony, based upon hearsay, as to its inaudibility and did not thereafter produce the device. The portion of the charge to the jury, pertaining to entrapment, is reproduced in the Appendix to this petition.

The questions presented are:

1. Is the defense of entrapment, asserted by a defendant in a criminal prosecution, one to be submitted to a jury for determination, or one which should be determined by the court?

2. Was entrapment established by the evidence in the instant case as a matter of law under the doctrine of entrapment enunciated by this Court in Sherman v. United States, 356 US 369, 2 L ed2d 848, 78 S Ct 819?

3. Did the charge to the jury in the instant case sufficiently apprise the jury of the elements of the defense of entrapment and the respective burdens of the government and the defense as to such defense according to doctrine of entrapment establishd by this Court in Sorrells v. United States, 287 US 435, 77 L ed 413, 53 S Ct 210, 86 ALR 249, and accepted by this Court in Sherman v. United States, supra?

4. Is the unsworn statement of an Assistant United States Attorney a proper response, like provoked and invited argument, when (1) said statement states the probative value of available, material and relevant physical evidence in the exclusive possession of government agents, the existence of which evidence is first established by the government during the trial, (2) said statement is based exclusively upon hearsay, (3) said statement is given in the presence of the jury during the taking of the evidence in a criminal trial, (4) said statement is given in reply to a request by the defense in the presence of the jury that said evidence be produced in court, and (5) the government fails to produce said evidence in court.

STATUTES AND FEDERAL RULES INVOLVED

Section 5008(b)(1), and Section 5642, Internal Revenue Code of 1954, Rule 26 and Rule 52(b), Federal Rules of Criminal Procedure are set forth in the Appendix.

STATEMENT OF THE CASE

Appellant was tried on a seven count Indictment, charging violation of the Internal Revenue Laws relating to liquors. The jury was unable to reach a verdict as to Counts one, two

and seven, found the appellant not guilty on the counts three and four, and found the appellant guilty of transporting moonshine whiskey under count five on September 23, 1957, and possessing moonshine whiskey under count seven on September 29, 1957. The trial Court entered a mistrial as to the counts upon which the jury was unable to agree.

Appellant relied upon the defense of entrapment, alleging and testifying that he was not engaged in transactions involving alcoholic beverages, nor would he have engaged in any such activities as described in the indictment had he not been approached and induced to do so by the officers, further, that the actions of the officers are the cause of any such activity on his part, which he did not previously have in mind doing.

The evidence is conflicting as to how the enterprise between the officers and appellant began. On the one hand, appellant claimed, collaborated by evidence from defense witnesses, that he was first contacted by the officers and coerced by them to enter into such an enterprise. On the other hand, the first officer coming in contact with appellant testified that appellant first contacted him by telephone. Except for this conflict as to the initial contact, the evidence undisputably shows that officers over an approximate two month period arranged sales at extraordinary prices to officers posing fictitiously upon which sales appellant was convicted, placed advance orders for whiskey, posed fictitiously otherwise, accepted bribes, misled other law enforcement officers, offered to obtain necessary supplies for the operation, agreed to represent to other officers that appellant was all right, shared in profits from the operation, suggested means to conceal the distillery, rigged up code language, told appellant that if he needed money he could have it, and told appellant repeatedly from the start that he would not get into any trouble through the enterprise.

Appellant testified that he had been convicted and had

pled guilty to State and Federal liquor violation charges prior to 1948 and had not since in any manner been connected with illicit liquor up until first contacted by the officers. Appellant admitted that some officers followed a truck loaded with 4,000 pounds of sugar into his yard on a date that he did not remember. A federal agent who did not participate in, work on, or was connected with this case in any way, according to the evidence, testified that he had received reports that appellant was in the liquor business prior to the date of the first contact of the agents and appellant.

The trial court overruled a motion for judgment of acquittal based upon entrapment made at the close of the evidence and submitted the question of entrapment to the jury. (R.201-202)

During the taking of the evidence, the first witness for the prosecution testified on direct examination that on September 23, 1957, the date of the first violation upon which appellant was convicted, that he had a wire recorder on his person and recorded the conversation, but did not know the disposition of the rig or what the outcome was. On cross examination of this witness, counsel for appellant stated to that witness that he would like to have the recorder if he had it. At this point, the prosecutor informed the Court that he had not called for it to be produced but would check in the hall in an effort to locate it and the defense attorney answered "Yes" to the question asked by the prosecutor, "Do you want to set this up in here to play it?" The defense attorney then continued with his examination of the witness and later the prosecutor returned and stated in lengthy detail that he had checked on the recorder and had been informed by a federal agent that upon the agent investigating the record and finding that it could not be understood, it had not been produced and "they didn't bring the machine with them." Counsel for appellant interrupted this hearsay explanation, objecting to the testi-

mony in the presence of the jury, and making a motion for judgment of acquittal, stating that the testimony was prejudicial and deprived the defense of an inference to which appellant was entitled. After an exchange of words with the Court, the Court asked the prosecutor if he was able to produce it, at which point the prosecutor reasserted his statement by saying, "I don't withdraw a thing I have said further." The Court then instructed the jury to pay no attention to why the recorder was not there and overruled the motion for a mistrial made by counsel for appellant.

The portion of the charge to the jury pertaining to entrapment is reproduced in the Appendix to this petition.

REASONS FOR GRANTING THE WRIT

1. The decision below should be reviewed so as to reassess the doctrine of entrapment according to the principals announced in the separate opinion of Mr. Justice Roberts, in which Mr. Justice Brandeis and Mr. Justice Stone concurred in Sorrells vs. United States, 287US 435, 453, 77 L ed 413, 423, 53 S Ct 210, 86 ALR 249, and the separate opinions of Mr. Justice Frankfurter, in which Mr. Justice Douglas, Mr. Justice Harlan and Mr. Justice Brennan concurred, in Sherman v. United States, 356 US 369, 2 L ed 2d 848, 78 S Ct 819, ad Masciale vs. United States, 356 US 386, 2 L ed 2d 859, 78 S Ct 827.

Shouldn't there be a limit established by public policy, common decency, individual rights, and the circumstances of a situation beyond which an officer should not go in the inducement of a person to commit a crime and still be able to come into Court and prosecute for the commission of that crime? This limit becomes more and more necessary as the Courts whittle down on the evidence necessary to show a justification for the inducement, which is the burden of the prosecution, and which now, by decisions of the courts, has been cut, for example, solely to proof of ready complaisance, a

criminal record of many years past, or even passing and slight evidence of reputation. This stretching of the majority opinion in the Sorrells case to this extent without any restriction upon the methods of inducement is undoubtedly what the minority in that case feared when it wrote its opinion and which the minority in the Sherman and Masciale cases now feel should be corrected. Language throughout the majority opinion in the Sorrells case points out the duties of officers to prevent and not incite, ensnare and create crime and the unconscionableness of a thought otherwise. However, the long line of decisions interpreting this opinion have not provided a proper limit upon permissible action of the officers so as to insure this result. To tolerate extreme over-zealousness and misconduct on the part of officers can not insure the upholding of this principal: If tolerated, and an innocent party is induced to violate the law, the evidence resulting therefrom and the searching examination of the life and being of the accused which is permitted is so prejudicial that in the eyes of the layman juror, the presumption of innocence is practically abolished, the burden on the defendant too heavily placed and the burden of the prosecution so lightened that the defendant is deprived of a fair trial. We urge that the law should provide a decent limit beyond which officers should not be permitted to tread. This limit should appropriately be determined by the courts and not by the jury, as was suggested in the Separate Opinion of Sherman v. United States, Supra, in the US. Reporter at page 385:

"The protection of its own functions and the preservation of the purity of its own temple belongs only to the Court. It is the province of the court and of the court alone to protect itself and the Government from such prostitution of the criminal law . . . Equally important is the consideration that a jury verdict, although it may settle the issue of entrapment in the particular case, can not give significant guidance for official conduct for the future. Only the court, through grad-

ual evolution of its explicit standards, in accumulate precedents can do this with the degree of certainty that the wise administration of criminal justice demands."

Public confidence in the fair and honorable administration of justice will surely wane unless a proper standard of conduct for law enforcement officers is provided.

2. The decision below should be reviewed because the opinion of the United States Court of Appeals for the Fifth Circuit, that the evidence in the instant case does not require a finding as a matter of law that appellant was entrapped, is in conflict with the doctrine of entrapment enunciated by this Court in Sherman v. United States, Supra.

The transactions forming the factual basis for both counts upon which appellant was convicted were arranged by the officers and sales resulting from the transactions were made to a federal officer. Certainly the officers induced appellant to commit the offenses for which he was convicted and the burden is shifted to the prosecution "to show an excuse" or "answer" to this conduct.

Now let us consider the "answer" or "excuse" shown by the prosecution to justify its "inducement" of defendant to commit crime.

The prosecution attempted to show in questioning defendant that a load of sugar was followed into defendant's yard some six months before the enterprise began; however, the defendant stated repeatedly that he did not remember even the approximate date of the incident. (R. 185). No evidence was offered to establish the date and for this reason, this evidence cannot be of any benefit to the prosecution in justifying its inducement since it may have been long before or after the inducement.

Defendant testified that he had been convicted and had pleaded guilty to federal and state liquor violations. How-

ever, these were prior to 1948, some nine years before the incidents concerned herein. According to the opinoin of this Court in the Sherman case at page 375 in the US reporter a record this old is insufficient to prove that petitioner had a "readiness" some nine years later.

Agent Poe weakly testified as to appellant's reputation of being in the liquor business. (R. 196). Nowhere is there any competent evidence that any of the agents who worked on the case and carried out the inducement knew of this record or reputation. How can the agents justify their inducement without showing that they were aware of these facts before the inducement? The courts have gone to great length in the search and seizure laws to protect the rights of individuals. An officer cannot justify his invasion of rights by what he later finds. Are these rights to be ignored in this instance? We say that they should not. The officers must be in a position to justify their actions of inducement by having knowledge of such justification at the time the acts are committed.

The conduct of the officers displayed in this case should not be tolerated, certainly upon the failure to show a proper "excuse" or justification for such conduct, and no citizen should be subjected to such extraordinary inducements. If the law were otherwise, it would not preserve the fundamental principle of our criminal law: better the guilty escape than the innocent suffer.

It must be remembered that much time and space was covered from the first contact to the date of the acts for which defendant was convicted. He may have been guilty of offering a bribe before entering the enterprise with the officers began but the offenses for which he was convicted were quite different and unquestionably the products of the acts of the officers. He might well have ceased the operation before the dates of the offenses upon which he was convicted but for the inducement.

Appellant was entrapped as a matter of law.

3. The decision below should be reviewed because the opinion of the United States for the Fifth Circuit in affirming the charge of the trial court on entrapment herein is in conflict with the opinion of the United States Court of Appeals for the Second Circuit rendered in U. S. v. Sherman, 200 F 2d 830 (2d Cir.,1952).

In the Sherman opinion, Judge Hand referring to Opinion of the Court in the Sorrells case, concluded that "occasions" exist when the prosecution has a valid reply to proof of inducement of the defendant to commit the offense charged. In such cases the questions of fact arise:

(1) Did the agent induce the accused to commit the offense charged in the indictment? (Emphasis provided).

(2) If so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense?

On the first question, the accused has the burden; on the second, the prosecution has it.

On the basis of these questions and burdens, Judge Hand, stating that due to the charge, "the case was left to the jury upon an erroneous statement of the law," then referred to the charge to the jury, as follows:

> "The Judge concluded his colloqual charge by telling the jury to ask themselves whether the 'Government' had procured the commission of the crime 'through trickery, or fraud of the officer, or undue persuasion,' or whether what it did was merely (to) afford an opportunity for the commission of a crime where the latent intent existed to commit the crime."

Judge Hand concluded that the above charge is improper because (1) the burden of the defense— ie., the inducement, was complete without trickery or fraud, and, in effect, such words are not proper to be used in determining whether one is induced. Further, that the second portion thereof (referred to as the second alternative) did not save or cure the charge because it did not "state the excuse." The "excuse" being the burden of the prosecution necessary to show justification for the inducement by the officers. Judge Hand makes further reference to a recharge as follows:

> "The law says you can't trick anyone into it by artifice or fraud such as giving a fabulous offer, or telling somebody that you are in excruciating pain and you must have it; or some such inducement that would put the idea into somebody's head where it never existed."

Judge Hand concluded that this recharge was improper because the terms "the idea", "existed before" and in "somebody's head" were too vague and general. He concluded that even assuming that the idea is that of the accused, the word "idea" is not stated so as to properly inform the jury that it must be an idea "to commit offenses like that charged."

Judge Hand concluded that "On no view can we find that the cause was presented to the jury in such terms that they could apply the law as we understand it; and the error, which went to the very heart of the prosecution, was grave enough to be noticed, although the defense had not excepted to it.

The charge to the jury in the present case will now be considered. The paragraphs of that portion of the charge on the "defense of entrapment" (R. 206-210) have been numbered consecutively 1-12 in the Appendix of this petition and will be referred to accordingly. It should be noted that counsel for appellant only requested that paragraphs 1. 2 and 3 be charged.

The charge in the instant case like the charge in the Sherman case discussed above, likewise was not presented in such terms that the jury could apply the law as set forth in the Sorrell's case and the error was grave enough to be noticed although not accepted to. Fed. Rules Crim Prac. rule 52(b), 18 U.S.C.A.

Certainly the officers induced the appellant to commit the offenses for which he was convicted because the sales constituting the basis for same were arranged by and made to federal officers. Therefore, the burden shifted to the prosecution to show an "excuse" for or "answer" to this conduct.

The term "entrapment" is used loosely and improperly in the instant charge. In paragraph 4 it is used where "defense of entrapment" was intended. In numerous other places it is used to infer that when one is "entrapped" his "defense of entrapment" is successful (paragraphs 5, 6 and 8). In paragraph 11, however, he states that "it is not . . . the entrapment of a criminal that the law frowns down." Later he states that "a money consideration" or "adequate motive" may constitute entrapment. It is no wonder that the court felt compelled to say in paragraph 9 that "confusion of thought arises sometime by the use of the word entrapment."

Portions of the charge pertaining to the excuse or justification for the inducement by the officers are found in paragraphs 1, 2, 3, 11 and 12. However, as in the Sherman case, Supra, none of them "state the excuse" and thereby cure the error. The burden of the prosecution, after substantial evidence of inducement, was not at any place brought out properly to the jury. In paragraph 12, at the close of the charge, the burden of the prosecution is stated in the form that a "general intention to commit such an offense" carries the burden of the prosecution. What is a "general intent"? It could certainly be short of proof that the accused was "ready and willing without persuasion", was "awaiting any propitious

opportunity to commit the offense", and stood ready to sell whiskey to "anyone who asked for it."

Referring further to the excuse, the burden of the prosecution, Judge Hand states on page 882 of his opinion that proof of past offenses must not be identical, but "near enough in kind to support an inference that his purpose included offenses of the sort charged." In the present charge, as in the Sherman charge, however, references are not so restricted. He uses such terms as—the law, in crime, a course of criminal conduct, the opportunity, the idea, and law violations, in an unrestrictive manner (paragraphs 2, 4, 5 and 6). This is particularly prejudicial in paragraph 5 where it is stated that there is no entrapment when "a person is already engaged in the violation of the law and if he is simply awaiting the opportunity to violate it further, and if an officer or anyone else comes along and affords the opportunity that he is ready to accept and take advantage of." What law? What opportunity? The jury could assume that this meant any law or opportunity which would not afford a correct understanding of the law. As Judge Hand said, "a valid reply to the defense" is when "the prosecution can satisfy the jury that the accused was ready and willing to commit the **offense charged.**" (Emphasis provided.) For example, the jury could believe that the law would allow an officer to organize a liquor plot, invite a person operating as a front for stolen goods to participate, who had never thought of engaging in liquor operations before the invitation, and after his acceptance and participation, to prosecute him and there be no entrapment as a matter of law.

The instant charge does not present the cause to the jury in such terms that they could apply the law as approved by this court and accepted by the United States Court of Appeals for the Second Circuit.

4. The decision below should be reviewed because the de-

cision of the Court of Appeals that the statement of the prosecuting attorney concerning the inaudibility of the recording device was proper in that it was like provoked and invited argument is contrary to the provisions of Rule 26, Federal Rules of Criminal Procedure and is not supported by the case of Schmidt v. United States, 8 Cir., 1956, 237 F 2d 542, 543, cited as authority by said Court of Appeals, and said decision concerns an important question of federal law.

The first witness for the prosecution testified on direct examination (R. 66) that on September 23, 1957, when he met with Hagans, he, the witness had a wire recorder on his person and recorded the conversation; however, he didn't know the disposition of the rig, who has it, or whether it turned out good or not. Here it should be noted that the Court of Appeals improperly stated in its opinion at page 928 of the Federal Reporter that appellant brought out the wearing of the recording device.

On cross examination of this witness, the Defense Attorney stated to the witness that he would like to have the tape recorder record if he had it. (R. 71). The prosecuting attorney then informed the Court he hadn't called for it to be produced but would check in the hall to "see if they have it". The defense asked the prosecutor to see if he could get the tape and wire and everything, and the prosecutor then asked, "Do you want to set up in here to play it?", to which the defense answered, "Yes".

The Defense Attorney then continued with his examination of the witness and later the Prosecuting Attorney returned to the courtroom and stated (R. 73):

> Excuse me, Judge, I checked on the bug for your Honor out there with the federal agent, the agent in charge, Mr. Kelley. He says that it was sent into his office and, of course, they investigated it to see if it could be played where it

could be understood, and he said since none of the conversation could be understood, that they didn't bring the machine with them, or didn't bring the records; said they have listened to it and it is just not understandable and that is the reason it has not been produced into Court. Of course, er—

At this point the defense objected to the testimony and continued narrative on the basis that it was testimentary in nature, exculpatory, and highly prejudicial. Further that the defense was entitled to have such testimony presented in proper evidentiary form and entitled to an inference upon the failure to do so. Based thereupon, the defense then made a Motion for Mistrial (R. 30). The court overruled the Motion but then solicited from the defense further explanation of the objection and motion in that the government explained its inaudibility instead of producing it.

The prosecuting attorney then stated "I don't withdraw a thing I have said further", after which, the court affirmed its ruling on the motion, instructing the jury to pay no attention to why the apparatus was not produced based upon any showing thus far (R. 31).

This improper testimony in addition to being error per se also was prejudicial in that it had the effect of explaining away the inference to which the defendant was entitled upon the Government's failure to explain by competent evidence the absence of the wire recorder. The inference is that such testimony, if produced, would have been unfavorable to the prosecution. Mammoth Oil Co. v. U. S., 275 U.S. 13 (1927), Lowery v. U. S., 128 F 2d 580 (2nd Cir., 1946), Ford v. U. S., 210 F 2d 313 (5th Cir., 1954), McClanahan v. U.S., 230 F 2d 919 (5th Cir., 1954), Nalls v. U. S., 240 F 2d 707 (5th Cir., 1957). Also, the incident was aggravated by the prosecutor saying, just before the adverse ruling, that he didn't take back a thing he had said.

The recording devise was certainly material and relevant. The defense had a right to ask for it and play it before the court and jury. Whether the record was audible, and the question of its evidentiary value, was one rightfully to be determined by the jury. It was certainly improper for the prosecuting attorney to state to the jury a hearsay conclusion as to its audibility given exclusively upon a request that it be produced, and in the absence of any exculpatory statement on the part of the defense.

The Court of Appeals has held that by the defense asking that evidence be produced, that, based upon this request alone, the prosecution may offer a hearsay conclusion as to the value of said evidence. The basis for this conclusion is that "it is difficult to see how the Government's attorney could have responded to appellant's request in any other way than he did" and that such request invited the response as to the evidentiary value and therefore the response should be treated in the same manner as "provoked and invited argument." We can find no authority to support this conclusion. The only thing that the defense invited was the production of the recording device. The prosecution then should have produced it or not and was not privileged to testify before the jury as to its evidentiary value.

It is felt that this court will not permit such laxity of the rules of federal courts as clearly spelled out in Rule 26, Federal Rules of Criminal Procedure. A prosecutor should not be permitted to "short cut" his evidence by filling gaps with hearsay testimony. Such practice would certainly fail to provide a fair trial to a defendant and the benefit to defendant of an inference to which he is entitled as recognized by this court.

The facts of the Schmidt case, cited by the Court of Appeals as its authority, show that this case is not proper authority here. In that case the statements complained of were made during the closing argument. It is well recognized that there

is an exception to the rule prohibiting the exceeding of the bounds of evidence and the inferences to be drawn therefrom, when a statement is invited and provoked in the argument after the evidence is closed. This exception has no application in the instant case. Also in the Schmidt case, the argument was invited by exculpatory statements which is not the case here. It should also be noted that in the Schmidt case there was no motion made and the Government's counsel acknowledged the error of his statement to the jury. Neither situation exists in the instant case.

CONCLUSION

The questions presented by this case are of great and recurring significance in the administration of the criminal law. The important nature of these issues has already been recognized by four of the Justices of this Court as recently as Sherman v. United States, Supra. The serious questions of public policy and individual rights involved here and the effect of the decision below, if unreversed, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

For these reasons and the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

CERTIFICATE OF SERVICE

I, J. Sewell Elliott, do certify that I have, on the date shown below, served the within petition (1) by mail upon the Solicitor General, Department of Justice, Washington, 25, D. C., by depositing same in a United States Post Office with sufficient air mail postage prepaid, addressed to him at his Post Office address, in accordance with Rule 33(1), Supreme Court Rules, and (2) personally upon the Honorable Frank O. Evans, United

States Attorney, Middle District of Georgia, Post Office Box 118, Macon, Georgia, the attorney of record who represented the United States in the Court whose judgment is sought to be reviewed, by delivering same at the office of said Counsel of record, in accordance with Rule 33(2), Supreme Court Rules.

This.....day of March, 1959.

J. Sewell Elliott

APPENDIX

OPINION

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17284

W. T. HAGANS,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(December 16, 1958.)

Before HUTCHESON, Chief Judge, CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: Appellant Hagans was convicted under two counts of a seven count indictment charging violation of the Internal Revenue Laws relating to liquors.[1] The jury was unable to reach a verdict as to Counts 1, 2 and 6, and found the appellant not guilty under Counts 3 and 4. He was convicted under Count 5 charging transportation of moonshine whiskey on September 23, 1957, and Count 7 charging possession of moonshine whiskey on September 29, 1957. The court below entered a mistrial as to the counts upon which the jury were unable to reach an agreement.

1 Count 1 charged possession of an unregistered still; Count 2, the carrying on of the business of distiller without giving bond; Count 3, the carrying on of business of distiller with intent to defraud the United States; Count 4, working at a distillery not bearing a sign; Count 5, transportation of moonshine whiskey; Count 6, sale of moonshine whiskey; Count 7, the possession of moonshine whiskey, all charges relating to September 29, 1957 except Counts 5 and 6 which related to September 23, 1957.

The defense upon which appellant relied was entrapment, but he earnestly argues a half dozen errors, contending that the cumulative effect of the errors was to require reversal even though they were not deemed separately as reversible error, or were not covered by exceptions. The argument is, therefore, that, as to all except the entrapment defense, the errors were prejudicial primarily in their cumulative effect.

Appellant's brief begins the argument by quoting Rule 52(b), Federal Rules of Criminal Procedure: "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court," citing *Cook Jr., et al. v. United States*, (5 Cir., 1958) 254 F.2d 871, in which the foregoing quotation is repeated. It is apparent that appellant's main contention is that, in the interest of justice, we ought to reverse even though the record does not show that the requisite exceptions were taken to the challenged rulings of the court below.

Taking up first the questions raised by the defense of entrapment, we find no merit in appellant's argument that his motion for directed verdict at the close of all of the evidence should have been granted on the ground that the defense was established as a matter of law. Conceding that "There is a strong conflict of evidence as to how the enterprise between the officers and Hagans began," appellant claims that the testimony disclosed that, although he had been in the whiskey business and had been convicted or pled guilty to charges in the federal court some ten years before the time involved in this indictment, he had reformed and was not in the business at, or a short time before, the events of September, 1957 upon which his conviction rests.

It is true that appellant did testify that he was approached by the state enforcement officers and importuned to pay them protection money and that he finally yielded to their pressures and got back into the liquor business. On the other hand, Georgia Revenue Agent Harding testified categorically and at great length that appellant initiated negotiations with him by 'phone call on August 23, 1957 which resulted in a meeting between them in which appellant offered $75.00 a week for protection from molestation by Georgia law enforce-

ment officers. He refused this office, but told appellant that he would talk with him later. He immediately contacted a federal enforcement officer and it was decided that state and federal officers would cooperate in an effort to gather evidence upon which to convict Hagans, who was proven, without objection, to have a bad current reputation with respect to liquor law violations.[2]

According to Agent Harding's testimony, appellant called him again at his home and asked if he had been able to make the arrangements which they had discussed. This led to a personal meeting at midnight between appellant and Harding in which Federal Officer Perry participated. Appellant agreed to pay each of the officers $100.00 a week, and paid Agent Perry $200.00 in currency at that meeting. Appellant advised them that, in return for the agreed payments, they were "to steer any agents, state or federal, out of the immediate area of the liquor still, that his still was set up in." Appellant told them of the location of his still and told them further that he wanted them to find some sugar for him and that, if they came across any liquor stashes, he would pay them $2.00 a gallon for the liquor.

Both Perry and Harding testified at length and in full detail to the negotiations and were subjected to rigorous cross-examination. Their testimony that it was appellant alone who initiated and pressed the negotiations was evidently accepted by the jury on the question of entrapment, and we think the jury was amply justified in believing the agents in preference to appellant and his witnesses.

Appellant makes an extensive argument that the charge of the trial judge on the issue of entrapment was prejudicially inadequate, relying chiefly on the opinion of Judge Learned Hand in *United*

---

2 In addition, the officers had discovered appellant transporting and unloading 4,000 or more pounds of sugar at his home, where a drive-in restaurant was operated, about March, 1957. Appellant was not able to give a satisfactory explanation of the possession of such a large amount of sugar, stating that he was selling it chiefly in 100 pound bags, but finally refusing to give the names of persons to whom he had made such sales. This evidence was admissible as a circumstance to justify suspicion on the part of the officials that the sugar was for use in the manufacture of whiskey. The instruction requested by appellant that "the possession of sugar is not a criminal offense" was properly refused under the circumstances revealed by the evidence before us.

States v. Sherman, 2 Cir., 1952, 200 F.2d 880, and the decision of the Supreme Court in *Sorrells v. United States*, 1932, 287 U.S. 435. Laying aside for the moment the fact that appellant did not except to the charge,[3] we find it to be unexceptionable.[4] Most of the charge was devoted to the question of entrapment and, viewed as a whole, it was exceedingly liberal to the appellant, quoting almost *totidem verbis* the charges requested by him. We think that the point is wholly without merit.

Considering now the most stressed alleged errors whose "accummulated effect" appellant claims deprived him of a fair trial, we take up first the argument that the actions of the trial court after submission of the case to the jury tended to coerce the jury to reach a verdict. About three and one-half hours after the jury had received the case the court called its members back into the courtroom, asking if the jury was troubled by any question of law. The foreman responded that the law was clear—"It is just a matter of deciding which to believe." The court then instructed the jury in general terms about the duty of jurors to discuss the case with each other and to be persuaded by reason,[5] and at its conclusion the parties were asked if they ex-

---

3 At its conclusion appellant's attorney stated: "I believe the charge to be unexceptionable unless higher authority denies. I don't." The trial judge responded: "I am sure the higher authority would not find anything wrong with it in the absence of any exception from counsel."

Under the holdings of this Court error based upon such contentions under the facts here before us would be considered only under very exceptional circumstances, Fowler v. United States, 5 Cir., 1957, 242 F.2d 850, and Contreras v. United States, 5 Cir., 1954, 213 F.2d 96.

4 Conforming to the tests of Sorrells v. United States, 287 U.S. 435, and [illegible] with the decisions of this Court. E.G., Kott et al v United States, 1947, 163 F.2d 984, certiorari denied 333 U.S. 887; Jindra v. United States 1934, 69 F.2d 429, certiorari denied 292 U.S. 651; and cf. Hamilton v. United States, 1955, 221 F.2d 611.

5 The substance of this charge is well summarized in this excerpt: "It is the duty of every juror to consult with every other juror and reach a mutual understanding in the case. The court does not mean to say that a juror is to give up an abiding conviction in the matter, but it is your duty to reconcile such differences, if any exist, and if it is possible to do so . . . .

"I charge you further, gentlemen, that the court has expressed no opinion in the case, and expresses no opinion whatsoever as to what your verdict should be. In a large proportion of cases absolute certainty cannot be expected. Although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellow jurors, yet you must examine the question submitted with candor and with a proper regard and deference to the opinion of each other . . ."

cepted to any portion of the charge. Appellant excepted in terms too general to conform to the requirement of Rule 30 of Federal Rules of Criminal Procedure.[6] The court advised counsel that the charge had been read "practically verbatim" from one United States Supreme Court report and from two Georgia Supreme Court cases. The instruction was, in our opinion, a proper exercise of judicial discretion and was in no sense coercive, but was in keeping with good practice.[7]

The charge did not apparently produce results, and the judge called the jury back into the courtroom at eleven P.M., some five hours later. Upon being advised that the jury had not reached a verdict but was making progress, the judge asked the marshal to make arrangements for their accommodation for the night, suggesting that they resume negotiations the following morning. No exception was taken to this action by the court and no argument is predicated directly upon it.

The following morning the court received a communication from the jury containing two questions which it discussed with counsel out of the presence of the jury. By agreement of the parties certain testimony was read by the court reporter to the jury referring to the date when the large amount of sugar was unloaded on appellant's premises. Appellant entered no objection to what happened except that he requested the judge to instruct the jury that the possession of sugar itself was not a criminal offense. The court declined to do so and, as stated above, we do not think that its action was erroneous. Cf. *Zavala v. United States*, 5 Cir., 1958, 256 F.2d 164, and *Samish v. United States*, 9 Cir., 1955, 223 F.2d 358, 366.

The second question asked by the jury was whether it was necessary to reach a decision on all seven counts, to which the court responded that the jury "may return a verdict on any number of counts or any single count, one or all, as to which you are able to reach an agree-

---

6 "I wish to respectfully except to Your Honor's supplementary charge, or whatever Your Honor designates it, upon the ground that taken as a whole it has a tendency, or it is calculated to have a tendency, to coerce a jury into reaching a verdict and I except to it because I will be harmed by it should it be a verdict of guilty."

7 Cf. Spring Co. v. Edgar, 99 U.S. 645; Patterson v. United States, 5 Cir., 1951, 192 F.2d 631; and Weathers v. United States, 5 Cir., 1942, 126 F.2d 118, certiorari denied 316 U.S. 681.

ment, and your verdict would be accepted as to those counts or that count upon which you are able to agree. And a mistrial will be declared only with respect to the remaining count or counts." Appellant advised that no exception was taken to that action of the court, counsel stating that he thought the court had the discretion so to act. Thereupon the jury brought in a verdict as indicated above. We find no error on the part of the court below in connection with its handling of the jury.

Appellant argues for a reversal because of what he refers to as "prejudicial testimony" of the United States Attorney arising from the following facts. While State Revenue Agent Harding was on the stand appellant brought out that, on one occasion, Harding was wearing a microphone (sometimes referred to as "the bug") and tape recording machine, which presumably had taken down some of the conversation between him and appellant. His attorney asked, in the presence of the jury, that the record and the entire device be brought into court and set up so that it could be played for the benefit of court and jury. The government attorney responded that he had not called for the mechanism to be produced, but would go out in the hall and see if any of the officers had it.[8] The quoted statement was interrupted by an objection by appellant based upon the charge that the United States Attorney was testifying when he was not on the witness stand, followed by a request for a mistrial on the ground that appellant was entitled to a favorable inference from the Government's failure to produce the instrument, which the Government attorney should not be permitted to destroy by his statement. The whole episode was concluded by the court's statement: "Very well. You insist on your motion and I overrule it. But I will instruct the jury to pay no attention

---

8 "Mr. Buford:

I didn't call for the bug to be produced down here, Judge. I'll go out here in the hall and see if they have it.

"Excuse me, Judge, I checked on the bug for Your Honor out there with the federal agent, the agent in charge, Mr. Kelley. He says that it was sent into his office and, of course, they investigated it to see if it could be played where it could be understood, and he said since none of the conversation could be understood that they didn't bring the machine with them, or didn't bring the records; said they have listened to it and it is just not understandable and that is the reason it has not been produced into Court. Of course,—"

to why the apparatus is not here. That is, as to any showing made thus far. Now proceed with your questions."

It is difficult to see how the Government's attorney could have responded to appellant's request in any other way than he did. Appellant had requested that he go out into the hall and bring the contrivance back and set it in operation. That was in the presence of the jury and, responding to it, the attorney made a fair statement of why it was not available. An invited response to a question in open court if fairly given is, like provoked and invited argument, not improper. *Schmidt v. United States,* 8 Cir., 1956, 237 F.2d 542, 543.

The situation here presented is not at all like that with which we dealt in *Nalls v. United States,* 1957, 240 F.2d 707. There, the United States Attorney had made a voluntary and unnecessary statement in the presence of the jury which was clearly prejudicial. The trial court refused to instruct the jury to disregard it. We held that, in a case such as that where the evidence was not fully developed and was unsatisfactory, the unprovoked statement of the United States Attorney was reversible error. We are not dealing with any such situation here.

We have considered these rulings along with several others made by the trial court and earnestly urged by appellant as error. We do not find that, in a case such as the one before the Court where the commission of the acts charged against the accused is admitted and the defense is one of entrapment, the errors, even assuming that they were such, were sufficient to require reversal. We think that the record reflects that the appellant was given a fair trial and the jury was justified, by the overwhelming evidence, in rejecting his defense of entrapment. The judgment is, therefore,

AFFIRMED.

JUDGMENT

Extract from the Minutes of December 16, 1959

W. T. HAGANS

No. 17,284 versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

STATUTES

26 U.S.C.A. 5008 (b) Stamps for containers of other distilled spirits.—

(1) Requirements.—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto in such manner as to be broken on opening the container, a stamp evidencing the tax or indicating compliance with the provisions of this chapter. The provisions of this subsection shall not apply to—

(A) distilled spirits placed in containers for immediate consumption on the premises or for preparation for such consumption;

(B) distilled spirits in bond or in customs custody;

(C) distilled spirits in immediate container required to be stamped under subsection (a) or under other provisions of internal revenue or customs law and regulations;

(D) distilled spirits in actual process of rectification, blending, or bottling, or in actual use in processes of manufacture;

(E) distilled spirits on which no internal revenue tax is required

to be paid or which are bottled especially for export with benefit of drawback;

(F) distilled spirits not intended for sale; or for use in the manufacture or reproduction of any article intended for sale; or

(G) any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery distilled spirits in the ordinary course of its business as a common carrier.

26 USCA 5642. Penalties for transporting, possessing, etc. distilled spirits in unstamped containers or counterfeiting of stamps, etc.

Any person who violates any provision of section 5008(b), or who, with intent to defraud, falsely makes, forges, alters, or counterfeits any stamp made or used under such section, or who uses, sells, or has in his possession any such forged, altered, or counterfeited stamp, or any plate or die used or which may be used in the manufacture thereof, or any stamp required to be destroyed by such section, or who makes, uses, sells, or has in his possession any paper in imitation of the paper used in the manufacture of any such stamp, or who reuses any stamp required to be destroyed by such section, or who places any distilled spirits in any bottle which has been filled and stamped under such section without destroying the stamp previously affixed to such bottle, or who affixes any stamp issued under such section to any container of distilled spirits on which any tax due is undetermined or unpaid, or who makes any false statement in any application for stamps under such section, or who has in his possession any such stamps obtained by him otherwise than as provided in section 5008(b) (2), shall on conviction be punished by a fine of not more than $1,000, or by imprisonment at hard labor for not more than 5 years, or both. Any officer authorized to enforce any provision of law relating to internal revenue stamps is authorized to enforce this section and section 5644 (relating to the bottling of distilled spirits in bond.) Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 692.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 26. Evidence.

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Rule 52(b). Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

CHARGE TO THE JURY ON ENTRAPMENT

(Paragraphs are numbered for purpose of reference.)

1. Now, on the question of entrapment, I charge you that the defendant claims that he was entrapped into committing the alleged offenses described in the indictment by the instigation and solicitation of state and federal officers, and that had it not been for such instigation and solicitation he would not have conceived or committed the acts for which he here is prosecuted. If you believe from the evidence that the defendant was so induced to do the things charged through the instigation and solicitation of the officers, or any of them, and that he would not otherwise have violated the law it would be your duty to return a verdict of not guilty.

2. I charge you that the defendant claims that, although on several prior occasions he had violated the Internal Revenue Laws, at the times referred to in this indictment he had abandoned all such criminal enterprises, and that at the time he was approached by the officers and solicited, as he contends, to engage in criminal conduct, he had no intention to re-engage in it, and would not have engaged in crime except for such instigations by officers of the law. If you believe from

the evidence that the defendant had at any time prior to being approached by the officers, in fact, abandoned a course of criminal conduct and that he would not have re-engaged in it except for the inducement or persuasion of an officer of the law, you should acquit the defendant.

3. I charge you that officers of the law cannot organize a liquor plot and then prosecute for it. And this is so whether or not the other persons involved, or sought to be involved, are reported currently to be engaged in the illicit liquor traffic.

4. In this charge I shall outline to you the essential ingredients of entrapment. And I am saying to you now that the mere fact that a defendant is reported to be engaged in law violations would not disbar or debar him from pleading entrapment if all of these other essential elements of entrapment are present.

5. And going further into this question of entrapment, I charge you that if a person is already engaged in the violation of the law and if he is simply awaiting an opportunity to violate it further, and if an officer or anyone else comes along and affords the opportunity that he is ready to accept and take advantage of, then there is no entrapment.

6. If on the other hand a person is not engaged in the violation of the law and is not presently thinking about or entertaining any notions about violating the law, and if an officer or someone else comes along and originates the idea, and implants the idea in the person's mind, and that person, who theretofore hadn't thought about it, and wasn't thinking about violating the law, yields to that suggestion and acts upon the idea implanted in his mind by the third person, then that would be entrapment, and a jury ought not to convict in such a case.

7. The gist of the defense of entrapment is the conception of the crime by the government's agent for the purpose of prosecuting the defendant, the latter not having any previous intention to commit it.

8. A money consideration or any other adequate motive incited by the agent to induce the crime may constitute entrapment, provided the conception of the criminal desire originated with the government's agent and was planted by him in the mind of the accused, who otherwise would not have committeed the offense. But when it is suspected that a crime is being committed, for instance, in the possession of transportation or manufacture of whiskey or sale of it, and the question is as to who is the guilty party, traps may be laid by affording the suspect an opportunity to do these things in order to catch the guilty person. A suspected criminal may be offered an opportunity to transgress in such manner as is usual therein. But extraordinary temptations or inducements may not be employed by officers of the government.'

9. At the possible expense of a repetition, I want to outline it to you a little bit further, because some confusion of thought arises sometime by the use of this word entrapment.

10. Whenever an officer of the law, by any plan or contrivance or opportunity presented, causes a person to commit a crime in which he is detected, the officer entraps the criminal, if he causes it to be done. It may also be said that the particular offense would not have been committed except for the act of the officer. Nevertheless when it is suspected that a crime is being committed and the question is as to who the guilty persons are, traps may be laid and baited as by decoy also, by opportunity to sell, or manufacture or transport whiskey, in order to catch the guilty person.

11. On the other hand, officers of the United States may not induce persons who would not otherwise have committed crime to violate the laws and then prosecute for it. A sound public policy and a decent fairness forbid it. It is not, therefore, properly speaking, the entrapment of a criminal that the law frowns down, but it is the seduction by its officers to commit crime. In some broad respects any defendant who is violating the law and is detected may be said to be trapped, because he wouldn't be violating the law in the presence of an officer

if he knew the officer were there. A suspected person may be tested by being offered opportunity to transgress in such manner as is usual therein, but may not be put under extraordinary temptations or inducements. Someone desiring to test a supposed liquor seller might represent himself to be such a person as could be trusted in such a transaction, and do and say such things as would not be unusual in such dealings. But he could not pret[illegible] sickness, for instance, or put extraordinary pressure upon his victim to get him to break the law. And, of course, could not organize a liquor plot and then prosecute for it. The question, I repeat, is not one of laying a trap, or of trickiness, or deceit, but one of seduction or improper inducement to commit crime. The former is permissible, and often necessary to enforce the law, but the latter is not.

12. The test is whether the offense originated in the mind of the accused or in the mind of the official. For the offense to originate in the mind of the defendant, it is not necessary that the defendant be the instigator of the particular sale or act, but only that he have the general intention to commit such an offense when the opportunity was presented.

Office-Supreme Court, U.S.
FILED
APR 7 1959
JAMES R. BROWNING, Clerk

No. 755

In the Supreme Court of the United States

OCTOBER TERM, 1958

W. T. HAGANS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM ANDERSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
WILLIAM J. SCHAFER III,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

CASES:

Baker v. *United States*, 115 F. 2d 533, certiorari denied, 312 U.S. 692	10
Hilliard v. *United States*, 121 F. 2d 992, certiorari denied, 314 U.S. 627	9
Masciale v. *United States*, 356 U.S. 386	6, 7
Myres v. *United States*, 174 F. 2d 329, certiorari denied, 338 U.S. 849	10
Schmidt v. *United States*, 237 F. 2d 542	10
Sherman v. *United States*, 356 U.S. 369	2, 6, 7
Sorrells v. *United States*, 287 U.S. 435	7

STATUTES:

26 U.S.C. § 5008(b)(1)	2
26 U.S.C. § 5642	2

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 755

W. T. HAGANS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet., 19-25) is reported at 261 F. 2d 924.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1958. A petition for rehearing was denied on February 5, 1959. The petition for a writ of certiorari was filed on March 7, 1959. The juris-

diction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner was entrapped as a matter of law.

2. Whether the Court should reconsider its holding in *Sherman* v. *United States*, 356 U.S. 369, that entrapment is a jury issue.

3. Whether the trial court's instructions on the issue of entrapment were adequate.

4. Whether prejudicial error resulted from the government attorney's explanation as to why he did not produce in court a recording that petitioner's attorney had asked him to produce.

STATEMENT

On May 17, 1958 in the United States District Court for the Middle District of Georgia, petitioner was convicted by a jury on two counts of a seven count indictment charging him with the possession and transportation of "moonshine" whiskey, in violation of 26 U.S.C. § 5008(b)(1) and 5642 (R. 2-5). Petitioner was sentenced to concurrent terms of 2 years (R. 245-246).

The government's evidence showed that on August 23, 1957 petitioner telephoned Robert Harding, a Georgia State Revenue Agent (R. 51-52). Petitioner said he wanted to talk to Harding and they agreed to meet at a place south of Thomaston, Georgia (R. 52). There petitioner asked Harding if they could not do business together. Petitioner said he had a liquor still "in a field partly camouflaged" and offered Hard-

ing $75 a week to protect him (R. 53). Harding refused the money, saying he would need a week to think about it and "feel out" his partner (R. 53). Harding reported this conversation to his superior officers and they decided to contact the federal Internal Revenue Service (R. 55). The federal Service sent Donald Perry to Thomaston to assist on the case (R. 56).

On August 30, 1957 petitioner again called Harding and asked how things were going (R. 56). Harding said that they would get together that evening and talk (R. 56). Later that night Harding and Perry (introduced as Donald Edwards) met petitioner (R. 9, 56). Petitioner offered each of them $100 a week for protection. When they agreed, he handed $200 to the agents (R. 9-10, 12, 56). Petitioner said that he had a "30-sacker" still on Po Biddy Road and that he used a 1952 Ford 4-door sedan and a 1949 Frazer, with a spotlight on the side of it, to transport the whiskey and to take supplies in and out (R. 10-11, 57, 58).

Harding next met petitioner on September 6, 1957, at which time petitioner related that he was "doing just fine, making liquor and everything was running smooth" (R. 59). He gave Harding $200 which Harding turned over to agent Perry (R. 59).

The three met again on September 13, 1957. They discussed petitioner's operations and he asked the agents if they could get two other agents out of the territory. They told him they would (R. 12-13, 60-61). Petitioner gave $200 to the agents. Agent Perry mentioned to petitioner that he could bring a bootlegger up from Florida who would pay him more for his moonshine than he was currently getting (R. 12, 61-62). Petitioner said that that would be a good idea

(R. 12-13). The man from Florida was again discussed at a meeting of the three on September 19, 1957 (R. 13, 14, 61-62). The next meeting took place on September 22, 1957. Frank Watt, a federal revenue agent, went to Thomaston to pose as the buyer from Florida (R. 14, 62, 102-103). They met at a spot on Po Biddy Road and petitioner and Watt agreed to a sale and the agents (Harding, Perry and Watt) agreed to meet petitioner at the same spot the next night to pick up the liquor (R. 14-15, 63, 103-104). The agents met petitioner the next night and transferred the liquor from petitioner's 1949 Frazer (R. 15, 64). Watt paid petitioner $400 (R. 15, 64, 104-105).

On September 26, 1957, at the same meeting place on Po Biddy Road, petitioner gave Perry $200 for protection and also $40 for arranging the sale to Watt (R. 16, 65). The agents informed petitioner that Watt would like to make another purchase and that he would be up on September 29 for 200 gallons (R. 66). At the meeting Harding wore a recording device that recorded his conversation with petitioner (R. 66).

On the 29th of September, when petitioner made his delivery to Watt at the meeting place on Po Biddy Road, Watt arrested him and seized the 200 gallons of non-taxpaid whiskey in the 1949 Frazer (R. 16, 67, 105-106). Harding, Perry, Watt and several other state and federal officers then went to the house on Po Biddy Road where petitioner had earlier told them his distillery was located (R. 17, 68). There they discovered the distillery in operation and about 65 gallons of whiskey (R. 17-18, 68-69, 106-107).

Petitioner's defense was entrapment. He testified that in the summer of 1957 he was not engaged in the handling of liquor (R. 169); that Harding came to his house and talked to him about setting up a still (R. 171); that Harding came back the next night and again asked petitioner to set up a still; and that a few days later Harding brought Perry to see him and also the uncle of petitioner's wife, who told petitioner that "they're liable to plant some on you" if he did not set up a still (R. 172). Petitioner then relented and did "as they said to do." (R. 173). He also stated that the agents (Harding and Perry) loaned him $250 to get the enterprise started (R. 173). Petitioner testified that, in addition to paying back this loan, the agents required him to pay them $200 a week (R. 174).

At the close of the evidence, defendant moved for a directed verdict on the ground that "the evidence here is sufficient to show entrapment" (R. 201). The court ruled (R. 202), however, that "it is a jury question," and submitted the issue to the jury under detailed instructions (see *infra*, pp. 7-8).

The Court of Appeals unanimously affirmed. It found "no merit" in the contention that the "defense [of entrapment] was established as a matter of law" (Pet., 20). Noting petitioner's concession that "There is a strong conflict of evidence as to how the enterprise between the officers and Hagans began" (*ibid.*), it ruled (Pet., 21) that the testimony of the Government witnesses "that it was appellant alone who initiated and pressed the negotiations was evidently accepted by the jury on the question of entrapment, and we think the jury was amply justified in believing the agents in preference to appellant and his witnesses." The court also rejected the contention "that the

charge of the trial judge on the issue of entrapment was prejudicially inadequate" (Pet., 21), holding (*id.*, p. 22) that, "viewed as a whole, it was exceedingly liberal to the appellant * * *."

ARGUMENT

1. Contrary to petitioner's contention (Pet., 8-10), the evidence does not establish, as a matter of law, that he was entrapped. As petitioner himself admits (Pet., 4), the "evidence is conflicting as to how the enterprise between the officers and appellant began." The evidence presented by the government, which the jury accepted, clearly showed that it was petitioner, and not the government agents, who initiated the criminal scheme. See *supra*, pp. 2-3. This evidence showed that petitioner, a convicted liquor law violator and apparently known as "a big bootlegger" (R. 171), had sought out government agent Harding in order to buy protection. Here, therefore, the criminal conduct was not "'the product of the *creative* activity' of the law-enforcement officials," since the "government agents 'merely afford[ed] opportunities or facilities for the commission of the offense'" which petitioner was already prepared and anxious to commit. *Sherman* v. *United States*, 356 U.S. 369, 372; *Masciale* v. *United States*, 356 U.S. 386.

The fact, upon which petitioner relies (Pet., 4), that during the two months following his initial approach to the government agents they jointly participated in illicit activities which led up to the crimes for which he was convicted, does not establish entrapment. For it shows only that "the particular act was committed at the instance of government officials," not

that it was the "product of the[ir] creative activity." *Sorrells* v. *United States*, 287 U.S. 435, 451.

2. Petitioner urges (Pet., 6-8), however, that this Court should reexamine its recent decisions in *Sherman* and *Masciale*, *supra*, that entrapment is an issue for the jury. But he presents no new arguments that were not considered and rejected by the Court in those cases. Accordingly, we submit that there is no occasion for the Court to reconsider the issue, which it decided adversely to petitioner less than a year ago, in a case in which the evidence shows that petitioner was not entrapped.

3. Petitioner contends (Pet., 10-13) that the trial court's instructions on the issue of entrapment were not clear enough to permit the jury to apply the law. As alleged examples of this, he cites certain words and phrases used in the charge which he claims were inadequately defined. When read as a whole, however, we submit that the charge was clear and explicit, and adequately informed the jury as to the standards for deciding the entrapment issue.

The principle portion of the charge was as follows (R. 207-210):

> And going further into this question of entrapment, I charge you that if a person is already engaged in the violation of the law and if he is simply awaiting an opportunity to violate it further, and if an officer or anyone else comes along and affords the opportunity that he is ready to accept and take advantage of, then there is no entrapment.
>
> If on the other hand a person is not engaged in the violation of the law and is not presently thinking about or entertaining any notions about violating the law, and if an officer or someone else

comes along and originates the idea, and implants the idea in the person's mind, and that person, who theretofore hadn't thought about it, and wasn't thinking about violating the law, yields to that suggestion and acts upon the idea implanted in his mind by the third person, then that would be entrapment, and a jury ought not to convict in such a case.

The gist of the defense of entrapment is the conception of the crime by the government's agent for the purpose of prosecuting the defendant, the latter not having any previous intention to commit it.

* * *

The test is whether the offense originated in the mind of the accused or in the mind of the official. For the offense to originate in the mind of the defendant, it is not necessary that the defendant be the instigator of the particular sale or act, but only that he have the general intention to commit such an offense when the opportunity was presented.

4. Finally, petitioner contends (Pet., 13-17) that he was prejudiced by a statement made by the prosecutor in connection with petitioner's request for production of a recording. Agent Harding testified (R. 66) that he wore a wire recorder at his September 26 meeting with petitioner. He stated that he did not know whether the recording turned out or what had happened to it (R. 66). On cross-examination petitioner's counsel asked Harding where the recording was. Harding said that it had been turned back to the federal government. Defense counsel then said "[i]f you have the bug I would like to have a record—". The Assistant United States Attorney, Mr. Buford, said: "I didn't call for the bug to be produced

down here, Judge. I'll go out here in the hall and see if they have it." Petitioner's counsel then said to Mr. Buford, "See if you can get the tape and wire and everything" (R. 71). When Mr. Buford returned he told the court that the recording was not produced because "none of the conversation could be understood" (R. 73). Defense counsel objected to the statement on the ground that the prosecutor was testifying, and moved for a mistrial. The court overruled the motion and instructed the jury to pay no attention as to why the apparatus was not produced (R. 73-76).

Petitioner contends that the trial court erred in overruling this motion because the statement had the effect of explaining away the inference which petitioner was entitled to draw from the Government's failure to produce the recording device that, if it had been produced, it would have been unfavorable to the prosecution (Pet., 15-17). But in view of the request by petitioner's counsel that the prosecutor attempt to obtain the recording, and the prosecutor's reply that he would "go out here in the hall and see if they have it," the prosecutor was fully warranted in explaining why he had been unable to obtain it. As the Court of Appeals stated (Pet., 25), "It is difficult to see how the Government's attorney could have responded to appellant's request in any other way than he did." The situation is analogous to those in which the government attorney explains or refers to evidence outside the record in response to statements of opposing counsel in his closing argument. In *Hilliard* v. *United States*, 121 F. 2d 992 (C.A. 4), certiorari denied, 314 U.S. 627, the government attorney, in response to a challenge in defendant counsel's closing argument as

to why the government did not produce documentary evidence of a telephone call allegedly linking the prosecuting witness to defendant, stated that such evidence was not produced because the records of the telephone company covering that period had been destroyed. The Court of Appeals held that such a statement was not prejudicial. See, also, *Schmidt* v. *United States*, 237 F. 2d 542 (C.A. 8); *Myres* v. *United States*, 174 F. 2d 329 (C.A. 8), certiorari denied, 338 U.S. 849; *Baker* v. *United States*, 115 F. 2d 533 (C.A. 8), certiorari denied, 312 U.S. 692.

The testimony was that the recording device was used only at the September 26 meeting. The trial court instructed the jury to ignore the incident. We submit that the trial court correctly denied the motion; and that, in any event, as the Court of Appeals stated (Pet., 25), this minor event in a trial in which petitioner's defense of entrapment was contradicted by the "overwhelming evidence" did not constitute prejudicial error calling for reversal.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
WILLIAM J. SCHAFER III,
Attorneys.

APRIL 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959—801875/P O 1275